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Number 4

DISCUSSION OF RECENT DECISIONS

DESCENDIBILITY OF VESTED REMAINDER SUBJECT TO BEING DIVESTED.—A case recently decided by the Supreme Court of Rhode Island¹ presents an interesting example of will construction involving remainder interests. By the first clause of his will, the testator directed his executors to deposit in a trust company such a sum of money or securities as would provide a certain annuity to be paid to his housekeeper. By the second clause, testator directed that upon the decease of his housekeeper the trust should cease and the principal of the trust fund should go into the rest and residue of his estate, and be distributed by his executors "in accordance with said rest and residue as hereinafter set forth." The testator then directed that the rest and residue of his estate be turned into cash by his executors and divided into eight equal parts, and he gave and bequeathed one-eighth part to each of his nephews and nieces, whom he named. He then directed that in case any of the beneficiaries should die leaving issue, such issue should take by right of representation. In case any of the beneficiaries should die without leaving issue, then the sum allotted to him or her should go into the rest and residue of his estate, and be divided equally among the surviving nephews and nieces. Philip Wheaton Rives King, one of the

¹ Petition of Hayden et al., 152 A. 254 (R. I., 1930).

nephews named in the residuary clause, died on December 31, 1922, without issue. The testator's housekeeper named in the first clause died September 23, 1927. Upon these facts, the question arose whether the estate of P. W. R. King is entitled to one-eighth part of the trust fund, or whether it should be divided equally among the testator's nephews and nieces who survived his housekeeper.

The court, in an opinion delivered by Justice Sweeney, said: "It is obvious that the testator did not intend to die intestate as to any portion of his property, as his will contains provisions which show a contrary intention. The law favors the early vesting of an estate given by will, and, in the absence of a clear manifestation of the intention of the testator to the contrary, estates are held to vest at the earliest possible moment. A remainder is vested when a definite interest is created in a certain person and no condition is imposed other than the determination of the precedent estate. In the case of the gift of a residue, the general rule is, that such a gift will be construed to be vested, unless a very clear intent is shown to postpone the vesting. The test of a vested remainder is its present capacity to take effect in possession whenever the prior estate shall determine; that is, if the remainderman has the right, in case of a sudden determination of the prior estate, immediately to go in and take possession, the remainder is vested."

Upon this point, the Justice has stated such undoubted principles of law that his citations of authority need not be repeated here. But, as he applies them to the facts of the case the perceiving student will sense a grave doubt that the authorities were pursued far enough. Containing no further citation, the opinion proceeds to conclusion, thus:

"Applying these principles of law to the facts in this case, we are of the opinion that the gift of the trust fund vested in the testator's nephews and nieces living at the time of his death. If Philip W. R. King had survived the testator's housekeeper, his right to one-eighth of the principal of said trust fund could not be questioned.

"Our opinion is that the share bequeathed to said Philip W. R. King was not divested by reason of his death without issue prior to the death of the testator's housekeeper, and that the share of said trust fund which would have been paid to said Philip W. R. King if he had survived the testator's housekeeper should be paid to the administratrix d. b. n. c. t. a. upon his estate."

In considering a question which involves will construction and the ascertainment of future interests, a review of the significant

developments in the history of remainders and their close kin, executory devises, will be of material assistance.

Fearne defines remainders in this fashion: "Wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse* and ascertained; in that case, notwithstanding the nature and duration of the estate limited in remainder may be such as that it may not endure beyond the particular estate, and may therefore never take effect or vest in possession, yet it is not a contingent but a vested remainder."² "On the contrary, wherever the precedent estate . . . is limited so as to determine only on an event which is uncertain and may never happen; or wherever the remainder is limited to a person not *in esse* or not ascertained; or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the precedent estate and duration of the estate limited in remainder, to give it a capacity of taking effect; the remainder is contingent."³ "The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines universally distinguishes a vested remainder from one that is contingent."⁴

At common law, numerous distinctions were to be noted in the creation and operation of vested and contingent remainders, some of which are now of diminished importance. Judicial interpretation and statutory enactments have mellowed and softened some of the former differences, just as these two ever-present forces have influenced many of the allegedly "harsh doctrines of the old common law."

For example, a vested remainder could be preceded either by a life estate or by a leasehold, whereas a contingent remainder could be preceded and supported only by a freehold, the latter estate accepting the seisin and holding it until the contingency determined and the remainder became vested. Thus it was that any attempt to create a contingent remainder without an intervening freehold estate was ineffectual and the attempted remainder utterly failed.

But following the Statute of Uses in 1535, conveyancers availed their clients of unforeseen benefits of the operation of that statute. Assume the case where it was desired to create an interest to take effect *in futuro* upon an uncertain event, or in favor of an unascertained person. A deed would be drawn creating a use to begin at the desired time in favor of the intended

³ *Ibid.*, 217.

⁴ *Ibid.*, 216.

grantee; at the appointed time, the use would take effect, the statute operated at once upon the "dry use" to invest the *cestui* with legal title, and presto! a future legal estate was created with no particular estate to support it. It mattered little here, then, that the future estate was contingent when it was created or that it had formerly required a preceding estate of freehold. For by employing this device, now known as a "springing use," no preceding estate at all was required. Further, if a use could spring to a future time carrying with it the legal title, similarly a use shifted from one *cestui* to another, upon some event, ought to carry with it the emolument of legal title. And so the courts held; wherefore we now know the "shifting use." In 1540, the Statute of Wills provided man with the right to dispose of his property by last will and testament, and with it went the right to create these two new future interests by will. When so created they were termed "executory devises."

Vested remainders have always been regarded as estates in property, and therefore alienable, devisable, and descendible, as any other estate.⁵ A contingent remainder, on the other hand—being a mere possibility of getting an estate—was held at common law rather restrictedly to the remainderman. A contingent remainder could not be conveyed to a stranger, but the interest might be released to the life tenant in possession and thus enlarge his estate into a fee.⁶ This common law doctrine was affirmed in Illinois in the case of *Williams v. Esten*.⁷ However, in England the common law was modified in 1845 by the Real Property Amendment Act,⁸ which provided that "a contingent, an executory, and a future interest, and a possibility coupled with an interest . . . whether the object of the gift or limitation of such interest or possibility be or be not ascertained . . . may be disposed of by deed."

In Illinois, under a statute providing for enurement of after-acquired titles,⁹ a warranty deed of his interest by an ascertained contingent remainderman has been held effectual when the condition upon which the remainder was to vest was performed before the termination of the particular estate.¹⁰ The Supreme Court of Illinois in 1928¹¹ affirmed a long line of cases¹² to the effect that "a contingent remainder is not an estate, but is

⁵ Kales, *Conditional Future Interests* (1905), sec. 71.

⁶ *Lampet's Case* (1612), 10 Co. Rep. 48a; 26 Yale L. Jour. 34.

⁷ 179 Ill. 267.

⁸ 8 & 9 Vict. c. 106; 26 Yale L. Jour. 37.

⁹ *Cahill's Ill. Rev. St.* 1931, Ch. 3, par. 7.

¹⁰ *Golladay v. Knock*, 235 Ill. 412; *Walton et al. v. Follansbee et al.*, 131 Ill. 147.

¹¹ *Raritan State Bank v. Huston*, 329 Ill. 604.

¹² *DuBois v. Judy*, 291 Ill. 340.

merely the chance of having one, and cannot be the subject of sale, cannot be levied upon by legal process, and cannot be conveyed voluntarily by deed." This late case goes on to mention the two apparent exceptions, the release, and the warranty deed plus enurement. In equity, however, the view as to alienability might be expected to differ. Mr. Justice Dunn has said: "Contingent interests and expectancies, though having no present existence and resting only in possibility, are proper subjects of contract. Contracts concerning such interests, when fairly made upon a sufficient consideration, may be enforced in equity after the subject matter of it has come into existence."¹³

Both under the English common law¹⁴ and in Illinois¹⁵ a contingent remainder has been held descendible if the person entitled thereto were ascertained and the condition upon which the remainder was to vest was not with reference to his person but to a collateral event.

Fearne is cited by Kales¹⁶ as authority that under the Statute of Wills a contingent remainder which was descendible was also devisable; the only restriction in either case was that the death of the ancestor, or testator, be not of itself an event which forever prevents vesting of the remainder. But devisability of contingent remainders in Illinois is still an open question.

The Wills Act¹⁷ empowers a qualified person "... to devise all the estate, right, title, and interest, in possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, of, in and to any lands, tenements. . . ." Whether or not this broad description includes contingent remainders has never been expressly decided.¹⁸

A highly important difference at common law between vested and contingent remainders was the destructibility of the latter by means over which the remainderman could exercise no control. This destruction would occur because of a disseisin of the life tenant, or by his act of tortious feoffment. In either case, the contingent remainder, being incapable of vesting in possession

¹³ *Cummings v. Lohr*, 246 Ill. 577.

¹⁴ *Weale v. Lower*, Pollexfen 54.

¹⁵ *Drury v. Drury*, 271 Ill. 336; *Ackless v. Seekright*, Breese 76.

¹⁶ *Conditional Future Interests* (1905), sec. 73.

¹⁷ *Cahill's Ill. Rev. St.* 1931, Ch. 148, par. 1.

¹⁸ *Drury v. Drury*, 271 Ill. 336, declared contingent remainders devisable, but the pronouncement was pure dictum. It purported to be based upon *Golladay v. Knock*, 235 Ill. 412, and *Ortmayer v. Elcock*, 225 Ill. 342, in both of which it was likewise dictum. The *Drury* case also mentioned 4 Kent's Commentaries 261 (see vol. IV, 14th ed. 1896, page 297) and the *Ortmayer* case referred to Sheppard's Touchstone 239 in support of the principle. It is clear, however, that while the views of these authorities are significant, they should not be taken to interpret an Illinois statute.

immediately upon the determination of the prior estate, however premature, must fail.¹⁹ The contingent interest might also be destroyed by a merger of the life estate in possession with the reversion,²⁰ or with the ultimate remainder in fee, either by a conveyance of one to the other, or the conveyance of both to a stranger.

At an early day alert conveyancers began to reduce this perishability by interposing between the particular estate and the contingent remainder a vested remainder "to trustees to preserve contingent remainders." Sir Orlando Bridgman, afterwards Lord Keeper, is credited with inventing this method about the year 1650.²¹ The courts, alive to the need, sanctioned the device, and another operative distinction between the two classes of remainders was done away. In Illinois, "trustees to preserve contingent remainders" were rendered unnecessary by a statute enacted in 1921,²² which provided "that no future interest shall fail or be defeated by the determination of any precedent estate prior to the happening of the event or contingency on which the future interest is limited to take effect."

One of the earliest efforts of the courts to break down the distinctions between vested and contingent remainders is disclosed in the case of *Edwards v. Hammond*,²³ decided in 1683. In this case, property was limited to A for life, remainder to B and his heirs if he live to be twenty-one, but if he should die under that age, then to A and his heirs. At the death of A, B was seventeen years of age. The court held title in B, subject to defeasance by his death before attaining twenty-one years. The principle laid down was: if, after words importing a gift of an absolute interest, a proviso is added which may defeat it, the remainder is vested, subject to divestment on condition subsequent. Formerly it had been held that contingencies as to event, or uncertainties as to persons to take, were to be construed as conditions precedent to the vesting of the remainder. It is apparent that, under the old rule, the interest of this remainderman would have failed because the condition had not been fulfilled prior to or upon the termination of the particular estate; whereas, under the ruling in this case his enjoyment commenced immediately upon the death of the life tenant, though subject to divestiture by his own death prior to the attainment of twenty-one years.

¹⁹ Archer's Case, 1 Co. Rep. 66b; Doe d. Planner v. Scudamore, 2 B. & P. 289.

²⁰ Egerton v. Massey, 3 C. B. (N. S.) 338; Bond v. Moore, 236 Ill. 576.

²¹ Powell's Future Interests, 166.

²² Cahill's Ill. Rev. St. 1931, Ch. 148, par. 24.

²³ 3 Lev. 132.

Having in mind the basic doctrines underlying remainders, and the importance still of distinguishing between them, we may advert to the facts of the principal case with the purpose of developing further those concepts especially pertinent. This will include examination of the authorities of sister states and comparison with the decision of the Rhode Island court.

It is to be observed that the question presented by this case does not involve the conflicting doctrines revolving around the oft-litigated phrase, "dying without issue." Possibility of indefinite failure of issue, or the effect of all lawful issue of a beneficiary predeceasing him, are not factors in this problem in will construction. The testator's words were "without leaving issue," the import of which is as unmistakable as though the word "surviving" were added. Since the remainderman, King, obligingly died without leaving issue, the vested or contingent character of his interest depends solely upon a determination of the time to which his death is to be referred, whether to the death of the testator, or to that of the life tenant. If investigation persuades us that the remainder was vested, we may anticipate the inquiry, "Was it vested absolutely, or was it defeasible upon condition subsequent?"

A reference to the definition of *Fearne* will indicate that the interest is a vested remainder; and almost countless authorities so hold on similar facts.²⁴ Quotations on this point, in addition to those in the opinion of the instant case, would be superfluous, but the six foot-note citations will show the general acceptance of the principle.

The court is with us thus far, and we take next the question of defeasance upon condition subsequent. In a parallel case, minus the complications of a remainder over, the Supreme Court of Pennsylvania decided that where a legacy is payable at a future time certain to arrive, without condition precedent, it is vested, where there is a person *in esse* at the testator's death capable of taking at such future time, though his interest may be defeated by his own death.²⁵

The Rhode Island court, however, seemed to feel that, since this remainder was determined to be vested, the conclusion was inevitable that it was a descendible interest. A further examination of authorities, beginning with an early Massachusetts decision, will reveal that such a conclusion is not inevitable and that the clearly expressed desire of the instant testator was unwarrantedly defeated. In *Blanchard v. Blanchard*²⁶ there was

²⁴ *Montague v. Curtis*, 181 N. Y. S. 709; *Brian v. Tylor*, 129 Md. 145; *Johrden v. Pond*, 126 Minn. 247; *Moulton v. Chapman*, 108 Me. 417; *In re Churchill's Estate*, 230 Mich. 148; *McArthur v. Scott*, 113 U. S. 340.

²⁵ *In re McCauley's Estate*, 257 Pa. 377.

²⁶ 83 Mass. 223.

a devise to A for life, and after her death to her children, B, C, D, E, and F; but if any should die in the lifetime of A, the property was to be equally divided among the survivors. It was held that the devise created vested remainders in the children, subject to divestment upon condition subsequent, that is death of any of them during the lifetime of A.

This doctrine of requiring the vested remainderman to survive the period of distribution if he is to defeat a gift over was adopted in Illinois in the old case of *Ridgeway v. Underwood*.²⁷ There a testator gave his wife an interest in his land during her life, in lieu of dower, for her support, and then provided that at the death of his wife and on his youngest child coming of age, the land should be sold and the proceeds divided among his seven youngest children, their heirs and assigns forever, and that "if one or more of said seven children should die before inheriting his, her, or their inheritance, to be equally divided amongst the remainder of the seven." It was held that the right of survivorship would be referred to the period of distribution, which was after the death of the widow and the majority of the youngest child, and not to the time of the testator's death.

In *Reynolds v. Reynolds*,²⁸ the Supreme Court of Alabama had occasion to pass upon facts consonant with those of the principal case. The testator had provided, "it is my will and desire that all my real estate shall belong to my beloved wife, [naming her], for and during her natural life, and upon her death that the same shall be equally divided between these dear children [naming five], and should any of the above-named children die childless then in that event his or her share in my estate shall be divided among those living of the above-named children." Henry, one of the five children taking the remainder, died childless after the testator, but before the death of the life tenant. It was held that the remainder in fee was vested in the five children upon the testator's death, subject to being divested by death prior to the expiration of the life estate; and that by reason of Henry's death his interest was divested, and passed over to the survivors.

It is desirable at this point to direct attention to the nice distinction between a vested remainder subject to divestiture, and a remainder to "survivors," the latter being necessarily contingent until survivorship is actually established. *Bender v. Bender*²⁹ is illustrative. The testator provided a life estate in favor of his widow in all his real and personal property. The instrument further read, "my wife, Mary Bender, [to] have exclusive control of all property herein bequeathed to her by me, and at her death

²⁷ 67 Ill. 419.

²⁸ 208 Ala. 674.

²⁹ 292 Ill. 358.

the same to be divided equally among our surviving children, share and share alike." The court in this case says: "A gift to survivors which is preceded by a particular estate, at the expiration of which the gift is to take effect in possession, will take effect in favor of those, only, who survive the particular estate.³⁰ The remainder is therefore contingent, since it cannot be known until the death of the life tenant who will survive her to take the estate." And to the same effect, Jarman in his treatise on Wills³¹ states: "the rule which reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which such survivorship can be referred, and that where such a gift is preceded by a life or other prior interest it takes effect in favor of those who survive the period of distribution, and those only."

One more instance of a vested, defeasible interest, and in addition thereto the operation of a shifting executory devise, is afforded by the case of *Lachenmyer v. Gehlbach*.³² The testator devised to his wife a life estate in all his property, and by the third clause of his will provided: "After the death of my said wife all of said property and estate above mentioned and described to go to my children, share and share alike, and shall any of my children die, then the children of such deceased child, should any children be surviving such deceased child, to take the share of the parent so deceased; and should any of my children die leaving no issue, then the share of such deceased child shall be divided equally among my surviving children." With respect to the character of the remainders to the testator's children, the court says: "If the conditional element is incorporated into the description of or into the gift to the remainderman, then the remainder is contingent, but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A, his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."³³ The application of that rule to this case will fix the remainder as vested in the children of the testator." The court held the remainders to the children subject, however, "to the shifting executory devises in the event that any of them die before the life tenant's death, either leaving children who would take or without children, when the share would go to the surviving

³⁰ *Blatchford v. Newberry*, 99 Ill. 11; *Burlet v. Burlet*, 246 Ill. 563.

³¹ Vol. 3 (7th ed.), 2065.

³² 266 Ill. 11.

³³ Gray, Rule Against Perpetuities, sec. 108.

children." This decision is cited with approval in the recent case of *Corson v. Thornburn*.³⁴

Returning to the principal case, and reading again the testator's words, there can be no doubt as to what he intended. It is evident by the plain language which he employed. He desired each and all of his nephews and nieces, or their respective children, to have the enjoyment of his property. He knew that this enjoyment could be had only by their being alive at the time fixed for distribution, which was upon the death of his housekeeper. He expressly excluded the general estate of a deceased beneficiary in naming alternate distributees. Yet, when the time for distribution has arrived, we see the court placing the personal representative of P. W. R. King on the same ground as a child of said King, express terms of the will to the contrary notwithstanding.

It is not as though the testator had expressed a desire which could not by law be given effect. As we have seen, descendibility is not a vital attribute of a vested remainder.³⁵ It is of the essence of an absolute and indefeasible vested remainder, but here the remainder was expressly made defeasible. And as pointed out previously, the condition beyond a reasonable doubt must have been the death of King without leaving issue prior to the time fixed for distribution. This condition was fulfilled, and should have resulted in enlarging the shares of the seven other nephews and nieces. It is submitted that the Reynolds and Lachenmyer cases in fact and principle are on all fours with the instant case, and that they more correctly state the law.

The construction of wills probably never can become an exact science, because the personal equation can never be solved. But the decision in the Hayden case recalls to the writer's mind one of Horace Walpole's humorous characters, whose will when opened was found to contain, in substance, this prayer: "Being of sound mind and memory, I hereby make, publish, and declare this, my last will and testament, and I earnestly desire the courts not to trouble themselves to make a new one for me."

MAY A MARRIED WOMAN MAINTAIN A BILL IN EQUITY FOR THE PURPOSE OF ENFORCING COLLECTION OF A DEBT CREATED BY A JUDGMENT FOR ALIMONY IN ANOTHER STATE?—This question was presented in the recent case of *Weidman v. Weidman*.¹ The Supreme Court of Massachusetts answered it in the negative. In

³⁴ 323 Ill. 338.

³⁵ *Lachenmyer v. Gehlbach*, 266 Ill. 11; *Reynolds v. Reynolds*, 208 Ala. 674.

1928, Mrs. Weidman, the complainant in this action, was granted alimony *pendente lite* and solicitor's fees in a proceeding filed by her husband in the Supreme Court of New York to annul the marriage. The following year, in that proceeding, judgment was entered in favor of Mrs. Weidman against her husband for a special sum representing counsel fees and alimony due the complainant, no part of which was paid.

A bill was then brought in the Superior Court of Middlesex County, Massachusetts, to secure the amount due in the New York judgment. The answer of the defendant averred that by the allegations of the complainant's bill, the complainant was still the wife of the defendant and that under the law of Massachusetts it could not be maintained. The bill was dismissed by the lower court. It was decided by the court that a decree for alimony for a gross sum established an obligation that was plainly in the nature of a debt. The proper method of collecting this debt was by an action at law. Such an action at law could not be maintained between husband and wife,² and that circumstance alone was not ground for relief in equity.

It was further decided that jurisdiction in equity exists over suits between husband and wife to secure her separate property, to prevent fraud, to relieve coercion, to enforce trusts, and to establish other conflicting rights concerning property. However, no such subject of equity jurisdiction was set forth in the bill of complaint; consequently, the decree of the lower court dismissing the bill was right.

An order for the payment of money as alimony, rendered by a court having jurisdiction, is entitled to recognition in another state of the United States under the "full faith and credit clause" of the Constitution as to all accrued installments which are not subject to further modification by the court originally rendering the order.³ This requirement of the Federal Constitution, however, does not preclude inquiry into the jurisdiction of the court in which the judgment for alimony was rendered. Obviously, the judgment can have no extra-territorial effect if it was rendered by a court which never acquired personal jurisdiction of the defendant.⁴ Aside from the question of jurisdiction, however, the foreign decree is *res judicata*.

1 274 Mass. 118.

² It is provided by G. L. Ch. 29, par. 6, that "married women may sue and be sued in the same manner as if they were sole; but this section shall not authorize suits between husband and wife."

³ Goodrich, Conflict of Laws, p. 310.

⁴ 2 Ann. Cas. 819 note, 3 Ann. Cas. 579 note.

Where a foreign decree is subject to modification by the court in which it was entered, neither the Federal Constitution nor the principle of comity requires the courts of another state to enforce it.⁵ A periodical allowance cannot be enforced as to installments not yet accrued; not only because they are not yet due, but because it is universally acknowledged that an allowance is subject to modification before its accrual.⁶ Nor may a decree be enforced in another jurisdiction as to installments already accrued, where the law of the forum wherein it was rendered expressly authorizes the modification of an allowance both as to accrued and future installments.⁷ Under such circumstances, a foreign decree may be enforced only as to such amount as it adjudicates to be actually due at the time of its rendition.⁸

A few courts, however, erroneously interpreting a decision of the United States Supreme Court,⁹ have held that a periodical allowance, so far as it awards alimony to become due and payable after its rendition, is not within the protection of the "full faith and credit clause" of the Federal Constitution so as to require its enforcement as to such installments in another state.¹⁰ In a subsequent decision,¹¹ however, the United States Supreme Court cleared up the tendency to confusion. A decree is deemed a final judgment so as to be within the "full faith and credit clause" so far as accrued installments are concerned, unless it appears from the law of the jurisdiction wherein a decree was granted that the power of modification extends to accrued as well as to future installments of alimony. This, of course, is with the understanding that no modification of the decree has been made prior to the maturity of such installments.

The problem before us, however, is of much narrower scope since it involves only those cases where a decree for alimony has been entered in connection with a divorce *a mensa et thoro*, for it is only in those cases that the parties remain husband and wife.

In beginning our examination of the authorities it would probably be most logical to examine the English law. The general rule which prevailed in England was that a suit could not be maintained at law by a *feme covert* and that, notwithstanding a divorce *a mensa et thoro*, a wife could not sue or be sued in a court

⁵ *Israel v. Israel*, 148 Fed. 576; *Page v. Page*, 189 Mass. 85.

⁶ 28 L. R. A. (N. S.) 1069 note. But see *Cummings v. Cummings*, 97 Cal. App. 144.

⁷ *Lynde v. Lynde*, 181 U. S. 183.

⁸ *Lynde v. Lynde*, 181 U. S. 183.

⁹ *Lynde v. Lynde*, 181 U. S. 183.

¹⁰ *Israel v. Israel*, 148 Fed. 576, 8 Ann. Cas. 697 and note; *Page v. Page*, 189 Mass. 85.

¹¹ *Sistare v. Sistare*, 218 U. S. 1.

of law. In several cases, however, she might maintain a suit in her own name as a *feme sole*, both in law and equity. These were exceptions to the general rule, where under certain circumstances, it could not be presumed from his own acts, that the husband's control of his wife was continued, and where she had been deprived of his protection to represent with her her rights and interests in a suit at law or one in equity.¹²

There were also exceptions in equity which were wholly unknown at law. Thus, if a married woman claimed some right in opposition to the rights of her husband, she could not maintain a suit against him at law, but in equity she might sue. It was necessary, however, for her to sue under the protection of some other person who acted as next friend, and the bill was exhibited in her name by such next friend.

Another ground of jurisdiction in equity was that courts of equity would interfere to compel the payment of alimony which had been decreed to a wife by an ecclesiastical court. This jurisdiction is ancient and the principal reason for its exercise was that when a court of competent jurisdiction over the subject matter and the parties, decreed a divorce, and alimony to the wife as its incident, and was unable of itself to enforce the decree summarily upon the husband, courts of equity would interfere to prevent the decree from being defeated by fraud. The interference was, however, limited to cases in which alimony had been decreed; then only to the extent of what was due, and always to cases in which no appeal was pending from the decree of divorce.¹³

At the present time in England, the law is substantially as stated above. The only important difference is in the manner and form of procedure. Since the Married Woman's Act, a married woman may sue and be sued as a *feme sole*, so that it is no longer necessary to bring suit under the protection of a next friend.

One of the earliest cases in this country in which the question of whether or not a married woman might properly maintain a bill in equity to enforce a foreign alimony decree was the case of *Barber v. Barber*.¹⁴ Mrs. Barber applied for divorce, by her next friend, in the court of chancery in the State of New York. The court had jurisdiction of both the parties and the subject matter. A divorce *a mensa et thoro* was decreed, awarding ali-

¹² See Story's Equity Pleading (6th ed.), sec. 61.

¹³ *Shaftoe v. Shaftoe*, 7 Ves. Jr. 171; *Dawson v. Dawson*, 7 Ves. Jr. 173.

¹⁴ 21 How. 582.

mony to the wife. Immediately thereafter, the husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court without having paid any part of the alimony. There he applied for a divorce *a vinculo*, not disclosing the circumstances of the divorce in New York, but alleging his wife had wilfully abandoned him. Hulda Barber then brought a bill in equity in the District Court of the United States for the district of Wisconsin, by her next friend, to give the same validity to the judgment in that state which it had in New York and to enforce the collection of the judgment. The court held that when alimony is not paid, the wife can sue her husband for it in a court of equity as an incident of that condition which gave her the right to sue him for a divorce. It was further decided that a woman who had obtained a divorce *a mensa et thoro* might acquire a residence separate from that of her husband so that the District Court had jurisdiction because of diversity of citizenship. It is interesting to note that an action at law had first been filed in the Circuit Court of the State of Wisconsin. The suit was dismissed, the court holding that the proper method of enforcing a foreign decree for alimony was by a bill in equity.

In *Cummings v. Cummings*,¹⁵ the plaintiff recovered a judgment against the defendant, her husband, in New York, granting to the plaintiff sixty-five dollars per week for the support of herself and her two children. The defendant became a resident of California, and the plaintiff brought suit against him there, setting up two causes of action and praying for equitable relief, first, for payments past due, and second, for equitable relief asking that future payments be decreed. The District Court of Appeal, holding that a judgment for alimony was not subject to modification for the sum already accrued, allowed for such sum and also decreed that future payments be made, at the rate fixed by the New York decree, for as long as that decree remained unmodified. The court said, "... he [defendant] argues that because our state courts are not bound to enforce the judgment of our sister state so far as applies to future payments, therefore our courts are bound not to enforce it. His premise is good, but his logic is bad, and it leads him into a position which is untenable." This decision is a recent one and shows a tendency on the part of the courts of some jurisdictions to extend the relief beyond the mere collection of the amount of alimony already due and unmodified.

While the divorce granted in New York was one from bed and board, there is no indication in the case that a ground for coming into equity was because of an inadequate remedy at law due to a disability to sue as a wife. The court does indicate, however, that the California courts of equity will take jurisdic-

¹⁵ 97 Cal. App. 144.

tion to prevent fraud in cases of this type and also to give full effect to the foreign decree. It is apparent from the opinion of the court that the remedy at law is far from being full, adequate and complete.

In the case of *Fanchier v. Gamill*,¹⁶ the situation differed from that in *Barber v. Barber* and *Cummings v. Cummings* in that the divorce granted was absolute and not from bed and board. A bill in equity was filed in the Mississippi court to enforce a decree for alimony rendered in Nevada. The defendant demurred to the bill and the demurrer was overruled by the chancellor. Upon appeal the only ground for demurrer which the Supreme Court deemed sufficiently meritorious to discuss was the one "that the chancery court of our state has no jurisdiction in the matter because the decree of the Nevada court amounts to no more than a judgment at law." The court in its opinion said, "It is our view that, on account of the character of a judgment for alimony, which rests, to some extent, upon public policy, in requiring a husband to support his wife and children, due to the sacred human relationship, and that they may not become public charges and derelicts, the decree for alimony, with the extraordinary power of enforcement by attachment and contempt proceedings, should be established and enforced by our equity court, which has full and sole jurisdiction of all matters of divorce and alimony; because to hold that a foreign judgment for alimony can be enforced in this state only by execution, the same as judgments at law, would be to impair or to deprive a foreign judgment for alimony of its inherent power of enforcement by attachment and contempt proceedings."

In *Mayer v. Mayer*,¹⁷ a bill in equity was filed in a Michigan court to enforce a judgment for alimony rendered in conjunction with a decree of divorce *a vinculo* entered in Oklahoma. The court found \$1700.50 due to the complainant as alimony and \$3172.34 for the support of the children. The decree of the court not being complied with, the defendant was adjudged guilty of contempt. Upon appeal, the Supreme Court of Michigan, finding that the Oklahoma court had the power, by statute, to revise the amount allowed for the support of the children, reversed the decree so far as it allowed for the support of the children. "The remaining question," said the Michigan court, "is whether the remedy by proceedings as for contempt is open in this case. In the absence of a statute authorizing attachment for non-payment of permanent alimony, it has been held in this state that such remedy is not open. We have a statute, however, which provides that 'every court of record shall have the power to punish by fine or imprisonment, or either, any neglect or violation of duty . . . in the following cases: . . . the disobedience or refusal to comply

¹⁶ 148 Miss. 723.

¹⁷ 154 Mich. 386.

with any order of such court for the payment of alimony, either permanent or temporary, made in any suit for divorce.' It is to be noticed that the authority conferred by this statute is limited to suits for divorce. The present suit is not a suit for divorce. . . . The order adjudging the defendant guilty of contempt will be set aside." This case indicates that while the power of the court to punish by contempt has been limited by statute the jurisdiction of the court of equity over these classes of cases has not in any way been curtailed.

In *White v. White*¹⁸ the complainant obtained separate maintenance and alimony in New Jersey and brought a bill in equity in the courts of Massachusetts to enforce the payment of the alimony. A general demurrer to the bill was overruled and the defendant answered. The lower court held that it had no authority to enforce payment of the judgment for alimony by contempt proceedings because it was based on a foreign decree. The Supreme Judicial Court of Massachusetts said, "It follows that the court had jurisdiction to enforce its decree for a money payment by issuing an attachment for contempt, and the ruling of the superior court that it 'had no jurisdiction to punish the defendant for contempt in failing to pay money according to a decree of that court, when the decree is based upon a decree of a New Jersey court in separate support or divorce proceedings in New Jersey' was wrong."

It is to be noticed that in this case the question of whether or not such a bill might be maintained was not decided because the question was not certified to the court. The decision implies, however, that had the defendant elected to stand by his demurrer, the decision of the lower court in overruling it would have been affirmed, for to hold otherwise after deciding that the decree might be enforced by contempt proceedings would be an anomaly.

It was formerly a general rule of the common law that an action at law would not lie upon a decree of a court of equity,¹⁹ and this rule was formerly applied to decrees for alimony rendered in another state.²⁰

One of the few cases which are to be found where a court of equity is denied the right to entertain a bill for the purpose of enforcing a foreign alimony decree is that of *Davis v. Davis*.²¹ A demurrer to the bill was overruled by the trial court, but the Court of Appeals held this was error and that the remedy at law was adequate. But in this case the relation of husband and wife

¹⁸ 233 Mass. 39.

¹⁹ *Hugh v. Higgs and Wife*, 8 Wheat. 697.

²⁰ *Van Buskirk v. Mulock*, 18 N. J. L. 184.

²¹ 29 App. D. C. 258.

had been severed and hence this decision does not directly answer the question under consideration.

*Dow v. Blake*²² is authority for the rule that an action in debt may be maintained upon a decree for alimony rendered in another state. The court bases its decision upon the fact that the decree has the same force and effect as a judgment at law and that the reason for the ancient jurisdiction of the equity courts no longer exists. This decision does not deny the power of a court of equity to grant such relief. It is generally followed in the various states in enforcing foreign alimony decrees in conjunction with absolute divorces.

It is apparent from the cases which have been cited that the courts which have rendered opinions upon the question are not in harmony and that it will be difficult to reconcile them and arrive at the true answer.

At common law there was no absolute divorce. There was what was called annulment of marriage and divorce *a mensa et thoro*. The ecclesiastical and equity courts had sole jurisdiction in granting the relief prayed for and in enforcing their decrees. The law courts had no jurisdiction either to grant the same relief or to enforce the decrees of the equity courts.

The equity courts of this country have exercised a like power from an early date. "In Maryland, the high court of chancery, from the earliest colonial times, exercised the jurisdiction to decree alimony but not to grant divorces . . . and in 1777 an act of the Assembly provided that the chancellor shall and may hear and determine all causes for alimony in as full and ample a manner as such causes could be heard and determined by the laws of England, in the ecclesiastical courts there."²³ In Alabama and North Carolina equity courts have had jurisdiction from an early date to decree alimony.²⁴ The same jurisdiction is granted in New York.²⁵

Since equity, under the early law, had no jurisdiction to grant absolute divorces, the power to do so in this country is purely statutory. In fact in most states all matters relating to divorce are now regulated by statute.

In the principal case, the New York court had power to grant alimony by statute without granting a divorce. The Massachusetts court had no such power, and it denied the complainant's right to enforce the New York decree upon the ground that the Massachusetts court must comply strictly with its own statute.

²² 148 Ill. 76. See also *Wagner v. Wagner*, 26 R. I. 27.

²³ *Barber v. Barber*, 21 How. 582.

²⁴ *Denton v. Denton*, 1 Johns. Ch. 364, 441.

²⁵ *Barber v. Barber*, 21 How. 582.

However, the bill was not for divorce but to enforce a foreign decree, and the court retained the power to grant that relief unless its power to do so had been abrogated by statute. In the *White* case, it was held that the courts of Massachusetts had the power by statute to enforce by attachment for contempt a decree for alimony rendered in another state. It is apparent from this that the court still has power to grant the relief prayed for, and the mere fact that there is also a remedy at law in an action in debt will not oust the equity court of jurisdiction. In *Boyce's Executors v. Grundy*,²⁶ the court said, "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficacious to the ends of justice and its prompt administration, as the remedy in equity."

The argument of the court that it was no ground for relief in equity that a woman could not sue her husband at law, loses much of its force in view of what has just been said. It is also apparent from the cases that an attempt on the part of the husband to avoid payment of alimony amounts to a fraud that courts of equity will prevent upon a proper bill being filed.

The *Cummings* case introduces an entirely new idea into the method of enforcing foreign decrees which involve the future payment of money. The doctrine of enforcing future payments until the decree of the court originally granting the relief has been changed is rather extreme, and it is doubtful if it will be followed by many of the states.

While today the majority of cases involving the enforcement of foreign alimony decrees are actions in debt, the cases studied indicate that the courts of equity still retain their ancient jurisdiction to enforce certain foreign decrees, as for alimony, except where the jurisdiction has been abrogated by statute. It would seem that Mrs. Weidman's bill of complaint was one which might properly have been maintained.

WHERE A TESTATOR DRAWS LINES THROUGH THE NAMES OF SOME OF THE BENEFICIARIES NAMED IN THE WILL, DOES THIS ACT CONSTITUTE A PARTIAL REVOCATION OR WILL IT BE HELD TO BE AN ALTERATION WHICH FAILS FOR WANT OF PROPER ATTESTATION?—This question was recently presented to the Supreme Court of Illinois for determination in the case of *Casey v. Hogan*,¹ where an appeal was taken from a judgment of the Superior Court of Cook County sustaining a demurrer to a bill filed to contest a will, and dismissing the bill for want of equity. The facts

²⁶ 3 Peters 210.

¹ 344 Ill. 208.

alleged by the bill and admitted by the demurrer were that Laura Hogan died leaving a validly executed will; that after execution thereof she drew lines through the names of some of the beneficiaries named therein, leaving the same legible; and that the entire will, including the parts canceled, was admitted to probate in the probate court of Cook County.

The Supreme Court affirmed the order of dismissal in a brief opinion stating that the statute governing the revocation of wills² makes no reference to partial revocation and that it has long been held in this state that an attempt to revoke a part of a will only, by any of the acts therein named will be of no effect unless the instrument is subsequently reattested.³

The problem presents three possibilities—first, the will should be established as originally written and executed without regard to the attempted cancelation; or, second, it should be disallowed as having been entirely revoked thereby; or, third, it should be admitted to probate excepting therefrom the words canceled on the ground of revocation *pro tanto*.⁴ As we have seen, the Illinois court has affirmed the first proposition as being the correct solution. This solution is not entirely free from difficulty.

Although the revocation as well as the execution of wills both of realty and of personalty is now governed by statute, this was not always the case. Prior to the enactment of the Statute of Frauds in England a will was revocable by parol.⁵ The result was that many wills were overthrown by perjured testimony, and Lord Nottingham expressed the hope "that some day no will should be revoked except by a writing." The next year the Statute of Frauds was enacted by Parliament, which provided that "no devise in writing of lands, tenements or hereditaments nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, . . ."⁶ The English courts, since the enactment of this statute, have consistently held that a clause of a will, as well as the whole

² Cahill's Ill. Rev. St. 1931, Ch. 148, par. 19. "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, . . . and no words spoken shall revoke or annul any will . . ."

³ Wolf v. Bollinger, 62 Ill. 368; Hesterberg v. Clark, 166 Ill. 241; Marshall v. Coleman, 187 Ill. 556; Schmidt v. Bauermeister, 279 Ill. 504.

⁴ In re Knapen's Will, 75 Vt. 146.

⁵ Brooke v. Ward, 3 Dyer 310 b.

⁶ 29 Car. II, c. 3, s. 6.

will, could be revoked by any one of the acts therein specified.⁷ Later the Wills Act of Victoria was passed which provided that "no will or codicil, or any part thereof, shall be revoked . . ."⁸ and further that "no obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words . . . shall not be apparent unless such alteration shall be executed in like manner as hereinbefore required for the execution of the will."⁹

In the United States, the right to revoke *pro tanto* is largely dependent on the statutes. According to one authority, "this doctrine of partial revocation, even under the restrictions adopted by later English legislation, is not greatly favored in American codes at the present day. Various codes now drop all reference to revocation in part; and the general policy indicates that such changes of disposition require an instrument executed with all the formalities of a will."¹⁰ On the other hand, Percy Bordwell in the "Statute Law of Wills"¹¹ found that in 1928 thirty-three states had provisions similar to the English Statute of Frauds and that all except that of New York¹² had been construed to allow partial revocation by any of the acts mentioned in the statute. It will be noted that the sanction, if any, is purely in negative terms, but the construction has been so consistently upheld that new legislation would be required to effect a change.

The states may be divided into two classes: those which have statutes making no provision for partial revocation,¹³ and those which have statutes providing for it in negative terms.¹⁴

⁷ Larkins v. Larkins, 3 Bos. and Pul. 16; Swinton v. Bailey, 4 App. Cas. 70.

⁸ 7 Wm. IV & 1 Vic. c. 26, par. 20.

⁹ Ibid. par. 21. See *In re Goods of Horsford*, L. R. 3 Prob. & Div. 211, where the testator pasted slips over some of the bequests in the will and wrote new gifts thereon. The court refused to allow the slips to be taken off and decreed probate of the will with these blanks. The new gifts also failed for want of attestation. The court said that the parts so covered were not apparent on the face of the will, and had Parliament intended to permit the use of chemical means to show what the words were, the statute could easily have been made to read "except so far as the words shall not be capable of being made apparent." But see *Ffinch v. Combe*, L. R. [1894] Prob. Div. 191, involving the same will where the court allowed an original devise when an expert testified he could read it by covering the page excepting the strip and placing the same over a strong light.

¹⁰ Schouler on Wills (3rd ed.), par. 397.

¹¹ 14 Iowa L. Rev. 290.

¹² *Lovell v. Quitman et al.*, 88 N. Y. 377. The New York statute contains peculiar wording, however, which apparently justifies the court's interpretation.

¹³ Illinois, Alabama, Connecticut, Massachusetts, Georgia, and Ohio.

¹⁴ Minnesota, Maryland, South Carolina, New Jersey, North Carolina.

Under the statutes of the first class the great weight of authority is that there can be no partial revocation by an act on the face of the instrument.¹⁵ It is under statutes of the latter type that most of the conflict of authority exists.¹⁶ A more particular examination of some of the statutes, and the decisions interpreting them will serve to illustrate the conflicting views.

In Alabama, it is provided, "A will in writing can only be revoked by burning, . . . with the intention of revoking it" ¹⁷ A testator duly executed his will and subsequently drew a line through the name of his son, a beneficiary. The will was never, thereafter, reattested. The court held that the code provided only for a revocation of "a will" and made no mention of partial revocation.¹⁸ It was provided elsewhere for the revocation of a will, in whole or in part, by a later will or codicil. The court remarked that the language used was a change from earlier codes, which had been patterned after the English Statute of Frauds. This change was considered significant and the court pointed out the great difference between revocation by will or codicil, and revocation by an act on the face of the instrument. The latter, unless it goes to the complete destruction of the will, is in its very nature an equivocal act. Some evidence, apart from the will itself is usually necessary to explain its extent and meaning.

The New York statute relating to the revocation of wills provides that "no will in writing . . . nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration and executed with the same formalities with which the will itself was required, by law, to be executed; or unless such will be burnt, torn, canceled, obliterated, or destroyed with the intent and for the purpose of destroying the same. . . ." ¹⁹ In the case of *Lovell v. Quitman*,²⁰ the trial court found that the deceased left a duly executed will, but had thereafter attempted to revoke two clauses by obliteration leaving them still legible. The Court of Appeals held the attempted revocation to be of no effect. The judge pointed out that the first part of the section providing for revocation by will or codicil refers to both "a will" and "any part thereof," while that part of the law governing revocation

¹⁵ See note 38 L. R. A. (N. S.) p. 797, et seq.

¹⁶ Ibid. p. 798. See also Page on Wills, (2nd ed.) I, 659. Jarman on Wills, (7th ed.) I, 134. Woerner, American Law of Administration (3rd ed.) I, 125.

¹⁷ Code 1886, par. 1968.

¹⁸ *Law v. Law*, 83 Ala. 432.

¹⁹ 2 R. S., part 2, Ch. 6, tit. 1, art. 3, p. 64, sec. 42.

²⁰ 88 N. Y. 377.

by act on the will itself refers only to "a will." The court refused to assume that this change was not intended by the legislature to be of some significance, and therefore gave effect to it, saying, "The mischief intended to be prevented by the observance of formalities in the execution of a will would reappear if the instrument could be altered in any less formal way."

The Connecticut statute providing the manner in which wills may be revoked is as follows: "No will or codicil shall be revoked in any other manner except by burning . . . it by the testator . . . or by a later will or codicil."²¹ In *Appeal of Miles*²² it was held that an entire clause erased remained a part of the will. There was, however, a finding that the erasure was not made by the testatrix, nor in her presence and by her direction. The court, although the question was not before it, went on to approve the doctrine that under this type of statute partial revocation could be only by will or codicil, and to express doubts as to the correctness of the rule declared in *Bigelow v. Gillott*.²³

The code of Georgia provides that "No will or codicil shall be revoked," etc.²⁴ In the case of *Hartz v. Sobel*²⁵ it appeared that the testatrix had cut out the names of certain beneficiaries with a penknife or other sharp instrument. The court held that as the statute made no provision for partial revocation by such means, the attempted revocation was ineffectual, the will never having been republished in its mutilated condition. As the words were completely cut out, the court permitted the blanks to be proved by extrinsic evidence. In the opinion, it was noted that the legislature had wisely withdrawn the power to revoke a portion of a will by anything on the instrument itself. The court believed that revocation should be attended with all the formalities required of the execution of a testamentary document.

A conclusion opposite to the one reached in the foregoing cases was the doctrine declared by the Supreme Court of Massachusetts in the case of *Bigelow v. Gillott*²⁶ under a similar statute.²⁷ It is significant that prior to this act, the law governing revocation followed the English statute and provided that "No will, or any clause thereof" should be revoked except in the manner therein stated.²⁸ The court gave no effect to this seemingly important change by the legislature and,

²¹ Gen. St. 1887, par. 542.

²² 68 Conn. 237.

²³ 123 Mass. 102.

²⁴ Civil Code of 1910, sec. 3919.

²⁵ 136 Ga. 565.

²⁶ 123 Mass. 102.

forgetting that the power to revoke is entirely dependent on the statutory grant, went on to draw authority from the broad, and rather vague, generality, that "The power to revoke a will, includes the power to revoke any part of it."

Maryland, on the other hand, still follows the old English statutes as to partial revocation.²⁹ In the leading case of *Eschbach et al. v. Collins and Bernard et al.*³⁰ it appeared that the testator drew lines through the names of two of his sons wherever they appeared in the will. The will originally named them executors, gave them their shares in fee, and devised to them the rest of the estate in trust for the remaining sons and daughters who were not mentioned in the will by name. The effect of the erasures on the wording of the will was to give all the sons their shares in fee simple absolute instead of as equitable life estates. The court held this to be not a mere revocation, but an alteration, just as much as if the testator had interlined new bequests in the will after execution, and because it was not attested it had no effect on the will as originally drawn. In the later case of *Home of the Aged of M. E. Church of Baltimore City v. Bantz*,³¹ in which the revocation, effected by obliteration of a certain clause, did not increase the share of any of the other beneficiaries, the court admitted the altered will to probate.

South Carolina also falls in the category of those states which provide for partial revocation in negative terms.³² In the case of *Brown v. Brown*,³³ the testator drew lines through legacies in a will having a residuary clause, leaving them legible. The court held that under the code, a will or any clause could be revoked; that had the legislature wished to except wills containing residuary clauses, it would have been so stated because of their common occurrence in wills. The power to revoke in whole or in part, was, in the opinion of the court expressly given in general terms. "The increase of the residuary estate," the court said, "which may result from the obliteration is not a new testamentary disposition, but a mere incidental consequence resulting from the exercise of the power conferred on the testator by the statute."

27 "No will shall be revoked, unless by burning etc.; or by some other will . . . signed, attested and subscribed in the manner provided for making a will." Gen. St., c. 92, par. 11.

28 St. 1783, Ch. 24, par. 2.

29 Code 1878, Art. 49, par. 5. "No devise in writing of lands, tenements, or hereditaments, or any clause thereof shall be revocable, except, etc."

30 61 Md. 478.

31 107 Md. 543.

32 S. C. Civil Code 1902, sec. 2401.

33 91 S. C. 101.

In *Barfield v. Carr*,³⁴ a noteworthy case in North Carolina, the court held that where a testator drew lines through three of the names of residuary legatees, there was a partial revocation good under the statute. The legacies were held to fall into the residuum and to pass to the residuary legatees.

In a New Jersey case, the facts show that Sophia Kirkpatrick died in New Jersey, leaving a duly executed will.³⁵ When the instrument was found in a trunk, it was discovered that two dispositive clauses had been crossed out in ink; and in the margin, a notation in the testatrix' handwriting to the effect that she wished the above mentioned clauses considered erased. The Act of 1846 in this state provided that no revocation of a devise or any clause thereof, otherwise than by some will in writing, or by burning, canceling, tearing or obliterating should be valid. The court held that the Act of 1851 in which was provided that all written revocations must be executed as wills, had no application in this instance. The drawing of lines through the legacies was sufficient, the marginal notes merely showing that it was done by the testatrix. It was held that "such canceling of a legacy by lines drawn by a testator revokes the legacy so canceled, and does not affect the residue of the will." The will, canceled clauses excepted, was admitted to probate.

The case of *Collard v. Collard*³⁶ is similarly significant. The will of George W. Collard, duly executed, devised the testator's entire estate to his second wife, Emily M. Collard, for life or so long as she remained his widow and upon her death or remarriage to his two sons, by his first marriage, in fee. After his death the will was found with his wife's name erased wherever it appeared in the instrument. It appeared that the wife at the time of her marriage to George Collard had a husband living and undivorced. When that fact became known to the testator, he erased her name from the will. The Orphan's Court admitted the entire will to probate on the ground that revocation enlarged the share of the sons in the residuary clause and was therefore an alteration and void. The decision was reversed on review. The court cited as authority on this proposition, Jarman on Wills,³⁷ "If the words obliterated do not give any person (apart from effect on residue) a larger estate than he would have taken by the will, or a new estate, the obliteration works a valid partial revocation. This appears to be the effect of *Swinton v. Bailey*." The court held the New

³⁴ 169 N. C. 574.

³⁵ In the matter of the will of Sophia Kirkpatrick, 22 N. J. Eq. 463.

³⁶ 67 Atl. 190 (N. J. Unreported).

³⁷ (5th ed.), I, 292.

Jersey statute permits revocation of any clause by obliteration, etc.; this construction has never been questioned.

The obliteration of the clause giving a life estate to the wife was an act of revocation and was held not to dispose of the property, "Because the incidental effect of such revocation increases the residue of the estate given the sons." In stating the ambulatory character of a will the court went on to say, "Once properly executed, the paper becomes a last will and testament, subject to a revocatory act by the testator to the extent he desires." It was noted that the legislature, which had thrown all the safeguards around the execution of wills, had remained silent as to any restraints on revocation other than those long provided for by the statute. The court, in an apparent attempt to sustain its decision in this particular case, stated that even if the surrogate had been correct, Mrs. Collard could take nothing by the will as the gift was to her as wife and limited to her as widow. As she could not answer either description at the time the devise took effect, the court held that the remainders to the sons would be accelerated.

From the cases herein noted it will be seen that in states where the statute provides for the revocation of a will or any part thereof, the courts which uphold partial revocation generally do so on the ground of the antiquity of the rule, and because the local legislatures have, in the face of such decisions, made no changes in the statutes.³⁸ This contention is not without merit because of the desirability of uniform interpretation of the statutes. Courts which reach the opposite conclusion under similar statutes have done so generally on the ground that the attempted partial revocation amounted to a new devise.³⁹

Assuming the former doctrine to be correct on principle, as it seems to be on authority, the next and more important question is to attempt to determine from the cases cited the better rule with regard to partial revocation under statutes which refer only to the whole will, as is the case in Illinois.⁴⁰ On examination, it appears that all of the cases under this type of statute noted herein, except *Bigelow v. Gillott*, are in accord with *Casey v. Hogan*, the instant case. The Massachusetts court rested its decision on four propositions: first, that it had been the uniform rule in that commonwealth under the first statute, which was of the English Statute of Frauds type, that partial revocation by act on instrument was effective; second,

³⁸ *Brown v. Brown*, 91 S. C. 101; *Barfield v. Carr*, 169 N. C. 574; *In the Matter of the Will of Sophia Kirkpatrick*, 22 N. J. Eq. 463.

³⁹ *Eschbach v. Collins*, 61 Md. 478.

⁴⁰ *Cahill's Ill. Rev. St.* 1931, Ch. 48, par. 19.

that the court would not infer an intention of the legislature to change this rule when the statute was changed to refer to a will only; third, that the power to revoke a will contains the power to revoke any part of it; and fourth, that to declare against partial revocation by act on the instrument would necessarily lead to similar construction in cases of partial revocation by codicil.

This later contention has support from some writers of textbooks. Percy Bordwell in speaking of the construction of statutes similar to those in Illinois says that while there is authority for not allowing partial revocation by act on the will, "it may well be doubted whether in failing to mention partial revocations there was any more intention to preclude partial revocations by act to the instrument than partial revocations by subsequent instruments, with regard to which there can be no question."⁴² This position, however, appears to be untenable for two reasons. Acts on the face of the will are, as pointed out in the case of *Law v. Law*,⁴³ equivocal in their nature, while a codicil, which revokes a will only so far as inconsistent with it, is an act protected by all the solemnities required by law. It is fundamental also that a codicil republishes the will as of the date of the codicil. It has therefore, the same effect, as a destruction of the old will and the making of a new one. For these reasons it cannot be considered to be an act on a parity with an act on the will itself so far as partial revocation only is concerned. The opinion of the Illinois Supreme Court, therefore appears sound on principle and in accord with the weight of authority.

⁴¹ 123 Mass. 102.

⁴² "Statute Law of Wills," 14 Iowa L. Rev. 290.

⁴³ 83 Ala. 432.